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No. 85-34

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

REX C. CAUBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's motion for a new trial, based on allegations of newly discovered evidence, was properly denied by the courts below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Al-All) is unreported. The opinions of the district court denying petitioner's motion for a new trial (Pet. App. A22-A49) and terminating his conditional release (Pet. App. A16-A21) are also unreported. An earlier opinion of the court of appeals affirming petitioner's conviction is reported at 706 F.2d 1322.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1985. A petition for rehearing was denied on April 9, 1985 (Pet. App. A12-A13). On May 29, 1985, Justice White extended the time for filing a petition for a writ of certiorari to July 8, 1985 (Pet. App. A14), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted of three counts charging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a), (c) and (d). He was also convicted of three counts charging violation of the Travel Act, 18 U.S.C. 1952, and four counts charging misapplication of bank funds in violation of 18 U.S.C. 656. Petitioner was sentenced to concurrent terms of five years' imprisonment on all ten counts and was also ordered to forfeit his interest in Cauble Enterprises, a business partnership, under the RICO forfeiture provisions. The court of appeals affirmed his conviction, 706 F.2d 1322 (1983), and this Court denied certiorari, (465 U.S. 1005 (1984)).

On January 23, 1984, petitioner filed a motion for a new trial based on newly discovered evidence, pursuant to Fed. R. Crim. P. 33. Following full briefing and a hearing, the district court denied the motion. The court of appeals affirmed.

1. The evidence at trial is set out in the opinion of the court of appeals affirming petitioner's conviction, 706 F.2d at 1335-1339, and is briefly discussed in its later opinion affirming the district court's denial of petitioner's motion for a new trial (Pet. App. A3). Briefly stated, the evidence showed that petitioner engaged with others in a scheme to operate Cauble Enterprises through a pattern of racketeering activity involving the importation of large quantities of marijuana from Colombia to the United States. The existence of a conspiracy and the involvement of several Cauble Enterprises employees—including Charles "Muscles" Foster, petitioner's ranch foreman—was never disputed at trial (see, *e.g.*, 706 F.2d at 1335; Tr. 209-211, 225).

In February 1977, petitioner began lending Foster substantial sums of money. 706 F.2d at 1335. Foster, in turn, lent money to Raymond Hawkins (*ibid.*; Tr. 288-289, 304, 308). Over the next two years, Foster and Hawkins conducted a series of marijuana smuggling ventures. 706 F.2d at 1335-1338. Prior to these ventures, petitioner had never lent money to Foster; however, after the illegal activities began, petitioner lent or arranged for loans to Foster that totalled $225,000 (Tr. 549-562, 603-611, 999-1000; GX 48). For example, in 1978 petitioner arranged for the Western State Bank of Denton, Texas—of which Cauble Enterprises owned 87%—to lend Foster over $87,000, a large portion of which was unsecured (Tr. 559, 563). Another Texas bank, of which petitioner was a director, granted Foster an unsecured $10,000 loan at petitioner's request (Tr. 679-686). Petitioner also arranged for a bank loan to be made to Hawkins (Tr. 258).

In addition to providing financial support, petitioner participated in the marijuana smuggling in other ways. He furnished transportation to Foster, Hawkins, and other conspirators in his private airplane (706 F.2d at 1336-1337; Tr. 245, 247, 312, 371-376, 1182-1183, 1191-1192, 1304-1305, 1308-1317, 1341-1347), or paid the airfare when conspirators flew commercial airlines on drug-related business (Tr. 433-434, 1185, 1194-1196; GX 35). The L.R. Ranch, owned by Cauble Enterprises, became a storage and distribution site for one multi-ton marijuana load (706 F.2d at 1336; Tr. 253-255, 1658-1671, 1735-1736), and two other Cauble Enterprises ranches became storage sites for other loads (706 F.2d at 1338; Tr. 265-268, 513-528, 1053, 1058-1068, 1070, 1076-1078, 1667-1668). Cauble Enterprises employees drove truckloads of marijuana (706 F.2d at 1336 n.39, 1338 nn. 49 & 50; Tr. 277), and on several occasions conspirators met in an apartment leased by a Cauble Enterprises business (706 F.2d at 1337; Tr. 516,

049-1050). Petitioner also lent the conspirators money to erect a privacy fence around an offload site (Tr. 337-338) and was involved in the quest for a shrimp boat that was used to smuggle marijuana (706 F.2d at 1337).

Other evidence at trial further established that petitioner participated in the marijuana smuggling activities. Petitioner and Cauble Enterprises received substantial and unexplained sums of money during the period of the conspiracy (706 F.2d at 1338-1339); the timing of these receipts corresponded closely to the arrival of marijuana-laden ships. Hawkins paid Foster $250,000 in petitioner's home, while petitioner was present, and Foster immediately handed half of that money to petitioner (706 F.2d at 1336 & n.42; Tr. 231-233, 285-287). Foster and Hawkins discussed marijuana smuggling in petitioner's presence (Tr. 284), and Hawkins and another co-conspirator testified at trial that petitioner knew of the smuggling (706 F.2d at 1336 n.42, 1338-1339; Tr. 234-235, 253, 263, 1089-1093, 1107-1109, 1153-1154). Petitioner assisted Hawkins in laundering money at a Las Vegas casino (706 F.2d at 1337; Tr. 257, 260-261, 378-382, 1039-1040, 1214-1218), and petitioner arranged for himself, Foster, and Hawkins to be placed on a list of persons exempt from the currency transaction reporting requirements of the Bank Secrecy Act, 31 U.S.C. 5313, even though none met the legal criteria for placement on the exemption list (Tr. 996, 1365-1389). As a result, they (and Cauble Enterprises) could make cash deposits in excess of $10,000 that would not be reported automatically to the federal government.

In sum, there was voluminous evidence of petitioner's complicity in the marijuana smuggling activities. See 706 F.2d at 1339-1343.

2. On the day that this Court denied review of the judgment affirming the original conviction, petitioner filed a motion for a new trial in the district court based upon 11

items of "newly discovered" evidence that he alleged were exculpatory, would probably produce an acquittal on all charges, and were deliberately withheld from the government before and at trial (Pet. App. A22-A23; 5 R. 1395-1431). Petitioner ultimately relied upon only six of those items (Pet. App. A25-A26; 6 R. 2275; 7 R. 206), to which he added two others in subsequent amended motions (Pet. App. A26; 6 R. 2219-2227, 2232-2242, 2276).

Petitioner claimed that the government withheld evidence that directly conflicted with or impeached the testimony of key prosecution witnesses. In particular, petitioner claimed in his motion that "numerous statements" by Charles Katko, who did not testify for either side at petitioner's trial, "directly conflict with Hawkins' testimony that [petitioner] invested money in Hawkins' smuggling operation" (Pet. App. A22). He also contended that the government failed to disclose an alleged promise to Hawkins that Hawkins' wife would not be indicted (*ibid.*). Additionally, he alleged that FBI Agent Joseph Masterson gave perjurious testimony concerning the type of payment that was used to cover a deficit in a Cauble Enterprises bank account (*id.* at A26).

The district court held a two-day hearing on petitioner's motion and gave careful consideration to the briefs, the testimony, the relevant documents, and the full record of the prior trial (Pet. App. A22-A49; see also *id.* at A17-A18). The court rejected petitioner's claims that the Katko materials provided a basis for a new trial. It concluded that the Katko statements were not exculpatory, did not contradict the government's evidence and, if disclosed, would not have affected the outcome of the trial (Pet. App. A27-A29, A38-A39). The district court also "accept[ed] as credible" the government's denials that Hawkins had been promised favorable treatment to his wife in exchange for testimony, noting in addition that even if the allegations were true they

would not have changed the trial's outcome (*id.* at A39-A40). Accordingly, it denied a new trial on that ground. Finally, the court rejected petitioner's claim that alleged "perjury" at trial entitled him to a new trial (*id.* at A44). The court found that Agent Masterson did not testify falsely at petitioner's trial (*id.* at A35) and stated further that, even if it accepted petitioner's allegations, "the tools with which to destroy Masterson's testimony on this issue, as well as his general credibility, were in the hands of [petitioner] at trial * * * [and thus] they cannot be considered 'newly discovered' for purposes of sustaining a motion for [a] new trial, nor can they be considered as 'suppressed' for *Brady* purposes" (Pet. App. A44). The district court concluded (*id.* at A48):

> The evidence which convicted [petitioner] was overwhelming and simply could not be refuted. * * * Among the evidence were thousands of documents inexorably proving [petitioner]'s guilt; damning admissions from [petitioner]'s own mouth on cross-examination; testimony regarding Foster's mental condition and [petitioner]'s stream of improper loans to Foster which were used to finance the smuggling operation; proof that there were no cash cattle sales, contrary to what [petitioner] told the government in an effort to explain the huge amounts of cash he deposited in his account at Western State Bank during the years of the conspiracy. None of the newly discovered evidence in any way impugns the basic fact, admitted by [petitioner] at trial, that Cauble Enterprises' ranches, airplane, banks, Houston apartment and employees were used over and over again by the drug smugglers to further the conspiracy and that [petitioner] was in frequent personal contact with the smugglers. * * *

> This Court has carefully and painstakingly reviewed the evidence and simply put, the Government provided [petitioner] all of the discovery that he was entitled to. At all times the Government acted in good faith in its actions throughout the Cauble prosecution.

3. The court of appeals affirmed "without hesitation" the district court's ruling (Pet. App. A2). Looking first to Agent Masterson's alleged "perjury" at trial, the panel stated that "we certainly are not convinced that, taken in context, Masterson made an intentionally false statement; indeed, it is arguable whether the testimony was false or simply ambiguous" (*id.* at A5). The court concluded that, even if false, the challenged testimony "when considered in the context of his entire testimony, was not ultimately material to [petitioner's] conviction" (*ibid.*). Additionally, it pointed out that the materials proffered by petitioner to impeach the veracity of Masterson's testimony were petitioner's own records, subpoenaed from him in advance of trial, and available to petitioner at trial (*id.* at A6). The court accordingly declined to reverse on that ground.

The court also rejected petitioner's contentions concerning the Hawkins plea agreement and the Charles Katko materials. The court found that the record supported the trial court's conclusion that the government did not promise Hawkins favorable treatment to his wife as an element of the plea agreement (Pet. App. A8). It also agreed with the district court's factual finding that Katko made no exculpatory statement to the government (*id.* at A9-A10). "[C]onvinced that [petitioner] raises no issue here which entitles him to a new trial," it affirmed the district court's decision in all respects (*id.* at A11).

ARGUMENT

Petitioner contends that the court of appeals' decision conflicts with *United States* v. *Bagley,* No. 84-48 (July 2,

1985), and that the petition should be granted to correct the conflict (Pet. 13, 20). That contention is meritless. *Bagley* held that government nondislosure of evidence favorable to the defendant requires reversal of a conviction only if its suppression might have affected the outcome of the trial. Slip op. 10.[1] In the present case, both the district court and the court of appeals unequivocally rejected petitioner's allegations that the government withheld information or submitted perjured testimony. They further concluded that, even if petitioner's allegations were true, the purported actions had no effect on the outcome of the trial. Petitioner simply seeks further review of factual findings that were determined by the district court, affirmed by the court of appeals, and fully supported by the record. Consistent with this Court's settled practice of declining to reconsider factual determinations affirmed on appeal, the petition should be denied. *E.g., Branti* v. *Finkel,* 445 U.S. 507, 512 (1980).

1. a. Petitioner repeats (Pet. 10-11) his claim that FBI Agent Masterson lied at trial concerning the type of payment made to cure a deficit in a Cauble Enterprises checking account. Both courts below, however, expressly rejected petitioner's assertion that Masterson gave intentional false testimony (Pet. App. A5, A35). And indeed, the record amply demonstrates that his testimony was not false;

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[1]In *Bagley,* a prosecutor failed to disclose requested evidence that could have been used to impeach a government witness. The district court found, beyond a reasonable doubt, that the evidence would have had no effect on the outcome of the trial. Slip op. 5. The court of appeals disagreed, concluding that failure to disclose impeachment evidence required automatic reversal. *Id.* at 6, 8. This Court reversed, holding that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* at 10. A majority of the Court also agreed that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 14 (Justice Blackmun, with O'Connor, J., concurring); *id.* at 1 (Justice White, with the Chief Justice and Rehnquist, J., concurring).

rather, at most, it was simply capable of being misunderstood.[2] Petitioner's continued accusations of perjury, examined in light of the record and the decisions below, are frivolous.

Petitioner's accusations not only distort the record, they require petitioner to give Agent Masterson's "perjured" testimony an interpretation that is inconsistent with the government's theory of the case. The government pointed to the account deficit simply to demonstrate that—prior to the receipt of marijuana revenues—petitioner's business was encountering cash flow difficulties and needed to rely

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[2]Agent Masterson testified concerning petitioner's and Cauble Enterprises' bank records and, in particular, his examination of the relationship between cash deposits to their bank accounts and the arrivals of boatloads of marijuana (Tr. 598-601). He described a chart (GX 50), which the government offered into evidence, depicting the timing of cash deposits into the Cauble Enterprises "special account" and demonstrating that large unexplained cash deposits coincided with the arrivals of marijuana shipments (Tr. 618-619; see also *id.* at 2243-2244, 2271-2272, 2278-2279). Summarizing the chart, Masterson explained that in 1978 the bank account was enriched by cash deposits totalling $692,653.83 (Tr. 620), a figure that petitioner does not dispute. He also testified that in January 1978, the account had showed a large deficit that was "compensated for" by "[s]ubsequent cash deposits * * * [f]rom the sale of cattle, winnings in Las Vegas, and loan repayments" (Tr. 622).

Petitioner alleges that Masterson committed perjury on the ground that the first deposits to offset the January deficit came from a mid-January transfer of money from another Cauble account and from the sale of a certificate of deposit (Pet. 10). That fact was made clear during the government's cross-examination of petitioner at trial when, in questioning petitioner about the January deficit, the government pointed out that "a few days later there is a transfer. I believe there's a sale of a CD that paid to cover that [overdraft], and you transferred the employees' benefit account from [another business entity] to your operating account, to the tune of $50,000.00" (Tr. 2116-2117). Thus, Agent Masterson's testimony simply reflects some ambiguity—that the government later clarified—as to when cash deposits, attributable to marijuana shipments, were first made.

on extraordinary financial maneuvers to satisfy its obligations. The government then proved that, later that year, the business was infused with large, unexplained, cash deposits that coincided with the arrival of marijuana shipments.[3] Petitioner's interpretation of Masterson's testimony would suggest that the cash deposits coincided with the account deficit, rather than the subsequent arrival of marijuana shipments. That interpretation would detract from the government's proof that petitioner's business received revenues from marijuana smuggling.

In all events, assuming that Masterson's testimony on this point was ambiguous, petitioner could have clarified matters on cross-examination. Records establishing the nature of the mid-January deposits were in the possession of petitioner and his bank (Tr. 599-600, 619, 898, 2068). Petitioner admitted that he had seen them before the trial began (Tr. 2076-2077, 2080). Thus, there was no obstacle preventing petitioner from challenging Masterson's testimony at trial. In accordance with the adversarial responsibilities inherent in a criminal trial, see, *e.g.*, *Bagley*, slip op. 7, petitioner should have probed further if he truly believed that a relevant discrepancy existed.[4] Furthermore, any ambiguity left uncorrected would have redounded to petitioner's benefit. Indeed, petitioner used Masterson's testimony in a reply brief on direct appeal to argue that the government failed to prove a link between the marijuana importations and Cauble Enterprises' bank account (Pet. App. A35).

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[3]For example, the government showed that a 35,000 pound shipment of marijuana arrived in late January 1978, after the January deficit was remedied (Tr. 517; see *id.* at 2243), and that a significant cash deposit followed shortly thereafter on February 9, 1978 (Tr. 896).

[4]*Bagley* does not dispense with the traditional threshold requirement for a new trial based on newly discovered evidence—that the evidence, in fact, be newly discovered and not derive from the defendant's own files. See, *e.g.*, *United States* v. *Metz*, 652 F.2d 478, 479 (5th Cir. 1981).

In sum, petitioner's characterization of Masterson's testimony as "perjury" is wholly inaccurate and provides no ground for this Court's review.[5]

b. Petitioner's claim (Pet. 8-9) that the government withheld from petitioner an aspect of its plea agreement with Hawkins—namely, immunity from prosecution for his wife, Karen Jacobs—is also factually infirm. The district court determined that Hawkins was not promised immunity for his wife in exchange for his testimony (Pet. App. A29). The court of appeals affirmed that factual finding (*id.* at A8), which is fully supported by the record (see 7 R. 38-39, 41, 48, 80-81, 96, 103, 108) and plainly requires no further review. See, *e.g., Branti* v. *Finkel,* 445 U.S. 507, 512 n.6 (1980); *United States* v. *Ceccolini,* 435 U.S. 268, 273 (1978).

We note, in addition, that the government supplied petitioner with a copy of the Hawkins plea agreement and that petitioner used the agreement extensively at trial. Indeed, the plea agreement's terms—including the anticipated release of a government lien on Hawkins' ranch following his testimony (Tr. 280-281, 408-413, 468-469)—received specific attention in closing argument (*id.* at 2254). Given petitioner's extensive use of the plea agreement for impeachment purposes, it is inconceivable that any additional promise concerning Hawkins' wife would have altered the jury's evaluation of Hawkins' credibility. See Pet. App. A8, A29-A30.

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[5]Since both courts below specifically rejected petitioner's allegations of perjury (Pet. App. A5, A35) there is no reason to address petitioner's contentions (Pet. 17-18) concerning petitioner's "capacity to refute perjured testimony." Indeed, petitioner's continuing allegations of perjury are wholly unwarranted in light of petitioner's complete failure to demonstrate intentional use of known false testimony and the lower courts' unequivocal rejection of those claims. Compare, *e.g., Di Gilio* v. *United States,* cert. denied, No. 84-1866 (Oct. 7, 1985).

c. Petitioner is also factually wrong in contending that Charles Katko made an exculpatory statement to government investigators, concerning the testimony of Raymond Hawkins, that the government was required to disclose (Pet. 8-9). Hawkins testified at trial that Muscles Foster lent him $25,000 from funds that Foster had received from petitioner (Tr. 288). Petitioner agreed at trial that he gave Foster $25,000, knowing it was to be lent to Hawkins (Tr. 2101). Hawkins further testified that he gave $15,000 to Charles Katko to rent a truck (Tr. 288-289). Katko was not called by either side at trial. At the hearing on petitioner's motion for a new trial, Katko denied that he had received $15,000 from Hawkins, but admitted receiving $2000 or $2500 (Pet. App. A27). Katko also testified at the hearing that he informed a government investigator, prior to petitioner's trial, that he did not receive the $15,000. However, the investigators testified that Katko did not deny receiving $15,000 (7 R. 31, 35, 53, 121, 140) and their reports contained no evidence that Katko had made such a denial (Pet. App. A27-A28).

Based on this evidence, the district court found that there were no prior statements by Katko to government investigators that "refute[] or materially conflict[] with Hawkins' testimony that he paid Katko $15,000 for the lease of his trucks" (Pet. App. A28; see *id.* at A38-A39). The statements Katko did make to the government simply had no impeachment value and therefore did not require disclosure (*ibid.*). The court of appeals affirmed the district court's finding that "Katko made no exculpatory statement to the government" (*id.* at A9). The district court's factual findings, affirmed by the court of appeals and supported by the record do not—once again—merit further review. *Branti,* 445 U.S. at 512 n.6; *Ceccolini,* 435 U.S. at 273.

Moreover, as the district court stated, "[e]ven if the Government was in possession of evidence from Katko * * * that directly conflicted with Hawkins' testimony regarding the $15,000 payment to Katko, the evidence merely concerns a minor point of the overall charged drug smuggling operation and could in no way have affected the outcome of the trial" (Pet. App. A29). Thus, the court found that a new trial would be unwarranted under any standard of materiality (*id.* at A39).

2. Petitioner's assertion (Pet. 13) that this case "presents important questions left open by this Court's very recent decision in *United States* v. *Bagley*" is untenable. Petitioner simply presents factual allegations that were rejected by the trial and appellate courts. *Bagley* does not alter this Court's "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred * * *." *Branti,* 445 U.S. at 512 n.6. Nor does it change the established rule that a district court's factual findings on a motion for a new trial must be affirmed unless "wholly unsupported by evidence." *United States* v. *Johnson,* 327 U.S. 106, 111 (1946).

As the district court stated (Pet. App. A20):

> [Petitioner] had a fair trial before this Court, he had a fair review of this trial before the Fifth Circuit Court of Appeals and the United States Supreme Court, he had a fair hearing before this Court on his Motion For New Trial. Society has given [petitioner] his due; an unfettered opportunity to exercise the constitutional and statutory rights guaranteed criminal defendants in this country—it is now time for [petitioner] to pay his debt to society.

The court of appeals agreed (Pet. App. A11). Further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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